Before the Committee on Commerce, Committee Bill Number 6097
Testimony of Nicholas J. Harding

My name is Nicholas Harding; I am a resident of Windsor, Connecticut, and am admitted to the bar of the State of Connecticut and have practiced law in Connecticut since 1979.

I appear today not on behalf of any of my clients, but as a concerned citizen, who has an interest in the development of environmental laws in the state of Connecticut. Since 1987 I have limited my practice to environmental issues. I have represented private parties in a variety of roles in state courts, federal courts and in administrative proceedings before both the US EPA, the Connecticut DEP and other agencies.

I come to speak today to provide my support to Committee Bill Number 6097, an Act Concerning Brownfields Development Projects.

I endorse all aspects of the bill and have come to speak as to section 4 and section 5 in particular.

With respect to Section 4, I would like to put forward the following observations. CGS §22a-452 is the Connecticut private party cost recovery statute that allows a property owner whose property has been contaminated by others to seek a remedy for such contamination. The statute is long overdue for amendment to provide an effective remedy to any private party who has had his or her property contaminated by the actions of others with a good strict liability statute, not unlike the federal statute, but at far less cost than the federal statute found at 42 USC §9601 *et seq.* It cures many problems with the current statutory scheme.

In my practice I have come across a line of cases for which the current statute provides no remedy. The current statute is a reimbursement statute. That means that the injured party must first spend the money to clean up the contamination and then sue to be reimbursed. There is no provision in current law to allow the court to award a declaratory judgment as to future costs and liability for future costs. Thus, when the oil delivery truck driver fills the basement with fuel oil and the property owner is given an estimate of $350,000 to remediate the contamination, the owner needs to first spend that money and then sue to recover out of pocket expenses. When there is no $350,000 on hand, there is no remedy under the existing statute.

This is a large impediment to the remediation of contaminated sites. By adopting the amendments to CGS §22a-452 this problem and similar problems arising with the remediation of Brownfields sites will be eliminated. Owners or developers who wish to acquire contaminated sites to restore them face the same problem as the homeowner. Amendments to section 22a-452 will cure that problem. The amendments parallel the federal statute or are superior to the federal statute. I will not bore you with the details unless you ask.

The proposals outlined in section 5, are designed to provide a cure for a decision handed down last year in a case dealing with Transfer Act compliance. In that case the transferor did not

comply with the Transfer Act at the time of sale of the property. The transferee did not learn of the failure, that is learn that the property was a Transfer Act property, until more than three years had passed from the sale of the property. Why was that significant? The Transfer Act does not have its own statute of limitations. The court, recognizing the traditional rule that the violation of a statute is a tort, applied a tort statute of limitations of three years, and thus the transferor was able to escape compliance with the Transfer Act.

The proposal in section 5 adopts a rule like that found for tax returns. If no tax return is filed the statute of limitations does not run. Under the proposal, if no Transfer Act form is filed, or if the wrong Transfer Act form is filed, then the statute of limitations does not begin to run until the correct form is filed. Once the correct form is filed the transferee is allowed to commence an action up to six years from the date of filing. Under this statutory and regulatory scheme the transferor is to complete its investigation of the property within two years after the filing and commence its plan of remediation within three years.

The simple change of providing for a statute of limitations will be useful. But I find that that amendment does not go far enough. Let me explain.

CGS §22a-134b limits the class of people who can chase the transferor for Transfer Act non-compliance to the transferee. That limitation is far too restrictive.

I am aware of at least one property which was leased by a landlord to a tenant. At the end of the lease term, tenant, a New York Stock Exchange traded company, sold the assets of the business to another party, and filed a Form III under the Transfer Act, promising to clean up the site. The purchaser/transferee of the assets immediately took the assets to Rhode Island.

The transferor of course has done nothing to remediate the site. The statute allows the transferee to enforce the obligations under the Transfer Act, but does not allow the landlord or other injured party to seek redress. Today the property sits vacant. Three different prospective purchasers have inspected the property, done their due diligence, and have decided to move on. The property is another vacant building off Interstate 95 in Bridgeport.

Are there other ways to try and enforce the Transfer Act in this case? Perhaps, there are. Are they as simple and as workable as expanding the class of people who are entitled to bring suit for violation of the Transfer Act? No. Can the legislature solve this problem? Yes. I recommend that House Bill 6097 be amended as follows:

> Sec. 5. Section 22a-134b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2009*):
>
> (a) The failure of the transferor or certifying party to comply with any of the provisions of sections 22a-134 to 22a-134e, inclusive, as amended by this act, entitles ~~the transferee~~ anyone suffering damages from such noncompliance to recover damages from the transferor and certifying party, and renders the transferor

and certifying party of the establishment strictly liable, without regard to fault, for all remediation costs and for all direct and indirect damages.

(b) An action to recover damages pursuant to subsection (a) of this section shall be commenced not later than six years after the later of the (1) due date for the filing of the appropriate transfer form under section 22a-134a, or (2) the actual filing date of the appropriate transfer form.

(c) This section shall apply to any action brought for the reimbursement or recovery of remediation costs and all direct and indirect damages provided this section shall not apply to any action that becomes final and is no longer subject to appeal on or before October 1, 2009.

Expanding the universe of people who can seek a remedy under the Transfer Act from the transferor or the certifying party for failing to comply can only benefit the redevelopment of Brownfields sites throughout the state. Allowing landlords and others injured by those who ignore their Transfer Act obligations will benefit the state by providing private developers the tools they need to recover costs of remediation.

These changes, the amendments to CGS §22a-452 and CGS §22a-134b, do not cost the state treasury a dollar. They do not call for the expenditure of state monies. They will have the long-term benefit of returning properties to use, to the remediation of Brownfields by private parties, and at no out-of-pocket cost to state or local governments. The benefit over the long haul will be the return of property to tax rolls.

Do you have any questions?

Thank you for your time and attention to this matter.

Respectfully submitted,

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